

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
DANVILLE DIVISION

SEP 08 2005

JOHN F. CORCORAN, CLERK  
BY: *H. McDonald*  
DEPUTY CLERK

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

KIRKWOOD D. CABINESS,

*Defendant.*

CIVIL ACTION NO. 4:02-CR-70031

ORDER AND OPINION

JUDGE NORMAN K. MOON

This matter is currently before the Court on Defendant's Motion for Disqualification of Assistant U.S. Attorney Donald Wolthius, filed August 8, 2005. For the reasons stated below, the Court DENIES Defendant's Motion.

Defendant alleges that Assistant U.S. Attorney Donald Wolthius has a conflict of interest and should be disqualified from this case. Defendant argues that he is being "vindictively prosecuted" based on the government's decision not to file a Rule 35(b) motion.

Prosecutors are generally accorded discretion and are necessarily permitted to be zealous in the enforcement of the law. *Marshall v. Jerrico*, 446 U.S. 238, 248-49 (1980). As this Court noted in its Order of September 2, 2005, the government is not required to file a substantial assistance motion, and a court has no authority to review the government's decision absent an unconstitutional motive or the lack of a rational basis. *U.S. v. Butler*, 272 F.3d 683, 686 (4th Cir. 2001). Defendant offers no evidence that Assistant U.S. Attorney Wolthius was influenced by an

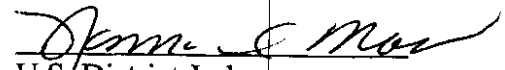
improper motive in his conduct of this case, and this Court has already denied Defendant's motions seeking to compel the government to file a Rule 35 motion.

As Defendant presents no new issues in his motion, but merely seeks to attack the government's decision from a different angle, his Motion for Disqualification is hereby DENIED.

It is so ORDERED.

The Clerk of the Court is directed to send a certified copy of this Order to all counsel of record.

ENTERED:

  
U.S. District Judge

9/8/05

Date